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Freedom of Navigation: Development of the Law of the Sea and Emerging Challenges

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Freedom of Navigation: Development of the Law of the Sea and Emerging Challenges

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Speech as prepared for delivery by Vladimir Golitsyn
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I. INTRODUCTION

Distinguished participants in the Workshop,

Please allow me at the outset to express my gratitude to the organizers of the Workshop for affording me the opportunity to deliver a keynote lunch-con address on the “Development of the Law of the Sea and Emerging Challenges.” It is of particular pleasure for me to appear before you today be-

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The thoughts and opinions expressed are those of the author and not necessarily of the U.S. government, the U.S. Department of the Navy or the U.S. Naval War College.

cause, as you probably all know, 2016 was a very special year for the International Tribunal for the Law of the Sea¹ since it commemorated the 20th anniversary of its establishment.

On October 7, 2016, a commemorative ceremony took place in the City Hall of Hamburg. On that occasion, statements were made by the United Nations Secretary-General, the President of the Federal Republic of Germany, the First Mayor of the Hanseatic City of Hamburg and myself. More than 500 guests attended this event. The commemorative ceremony was preceded by a two-day international symposium dedicated to the “The Contribution of the Tribunal to the Rule of Law,” which was held on October 5 and 6, 2016. Over 150 participants, among them Judges of the Tribunal, of the International Court of Justice and of other judicial institutions, as well as academics, lawyers and counsel who have appeared before international courts and tribunals, attended the symposium.

II. THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

The 1982 United Nations Convention on the Law of the Sea is one of the most complex international treaties that has ever been negotiated. While the Convention confirmed many provisions of customary international law codified in the 1958 Geneva Conventions, its main achievement was the progressive development of international law. In this regard, the 1982 Convention introduced the concepts of the exclusive economic zone and archipelagic waters, clarified the legal framework governing passage through straits used for international navigation, defined the legal regime of the continental shelf and established the criteria to be used by a coastal state in establishing the outer limits of its continental shelf. The Convention also contains extensive provisions concerning the protection and preservation of the marine environment, and provides for a mechanism, in the form of compulsory procedures entailing binding decisions, which aims at ensuring compliance with these provisions.

1. *See* The International Tribunal for the Law of the Sea, The Tribunal, <https://www.itlos.org/the-tribunal/> (last visited June 6, 2017) [hereinafter Tribunal].

A. Ocean Governances: Past Successes and Current Challenges

While the Convention represents the best effort on the part of the international community of states to address governance issues that required solution at the time of its conclusion, the Convention did not resolve all of them in detail. Consequently, while the Convention quite rightly is called “a constitution for the oceans”—and there is no doubt that the conclusion of the Convention constituted a remarkable achievement—it should also be acknowledged that the regime for the governance of oceans, which it contributed to create, still has gaps that need to be addressed. This was clearly demonstrated by the fact that shortly after the conclusion of the Convention two implementing agreements had to be negotiated to supplement its provisions, namely the 1994 Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 and the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.

It should be acknowledged that the Convention does not provide and has never been intended to provide an answer to every problem that arises in sea-related matters. It is a framework convention and, as a framework convention which enjoys almost universal acceptance, it has proved to be a flexible instrument providing a solid legal foundation for the further progressive development of the international law of the sea, as a platform on which new emerging issues relating to the international governance of activities in the oceans are to be addressed.

Although the Convention addresses issues relating to the management of marine resources in a somewhat comprehensive way, it does not cover a number of emerging issues such as the conservation of marine biodiversity, carbon sequestration or the use of marine genetic resources. Likewise, it does not address some issues arising from global warming or the rapidly increasing demand for energy sources. So, new issues continue to arise and need to be addressed. The most recent—and most noteworthy—development in this regard is the decision by the United Nations General Assembly in 2016 “to develop an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.”²

2. G.A. Res. 69/292, U.N. Doc. A/RES/69/292 (June 19, 2015).

The international community of states should seek solution to these emerging issues through the process of international governance within the framework of relevant existing institutions. First, the United Nations, its agencies and related organizations that provide fora where states and other actors can engage in a dialogue and negotiations which, if successful, should result in additional norms and regulatory regimes supplementary to those established by the Convention and facilitating its implementation.

Let me refer in this context to the conservation and sustainable use of ocean resources, which in our days should be viewed as a matter of common concern. The international community of states has a common responsibility to ensure conservation and sustainable use of these resources and that individual states have a legal obligation in this regard vis-a-vis the whole international community of states regarding the conservation and sustainable use of these resources and that such obligation can be enforced by or on behalf of that community of states.³

It is understood, for example, that marine living resources of the high seas constitute a matter of common concern for the international community of states as a whole. Consequently, any State Party to the Convention or a group of such states have the right to invoke the responsibility of a state or states not complying with their obligations under Section 2 of Part VII of the Convention by breaching those obligations owed to the international community of states.

B. Energy and Resource Management

Another emerging issue concerns oceans energy resources, considering that the oceans offer a vast and powerful source of energy that has so far not been utilized on a significant scale. For example, one of the issues that arise relates to the potential use of methane hydrates: white, ice-like solids that consist of methane and water. Some scientists, such as Professor Klaus Wallmann of the GEOMAR Helmholtz Centre for Ocean Research Kiel, are of the view that there is ten times more natural gas in methane hydrates than in conventional gas deposits. Methane hydrates are only stable under certain pressures (35 bar or 507.6 pound-force per square inch) and at low temperatures. At seas and oceans, methane hydrates may therefore primarily be

3. See generally PATRICIA BIRNIE, ALAN BOYLE & CATHERINE REDGWELL, *INTERNATIONAL LAW AND THE ENVIRONMENT* (3d ed. 2009).

found on the continental slopes, those areas where the continental plates meet the deep-sea regions.

Methane hydrates constitute a natural non-living resource and their mining in all likelihood will take place in the EEZ or on the continental shelf of a coastal state. Thus, pursuant to the Convention, their exploration and exploitation will be governed by the applicable laws and regulations of coastal States. However, as it is unclear to what extent it would be possible to mine the ocean floor for such resources without inflicting significant harm on the marine environment and negatively affecting climate on our planet, this type of activity should be a matter of concern for the entire world community. Consequently, in the context of marine governance of energy resources the question arises as to whether the regulation of the potential use of methane hydrates should be left to the discretion of coastal states or should be subject to some form of international regulations as well. Furthermore, the vast spaces of the open ocean make it an intriguing location for extracting renewable energy. Wind, waves and currents together contain 300 times more energy than humans are currently consuming. It is hoped that wind, waves and ocean currents will meet a substantial share of the world's electricity need.

The production of environmentally friendly energy from the oceans is now being promoted worldwide. The broad suite of technologies collectively known as ocean energy is also beginning to emerge as a viable baseload source of renewable energy. Ocean energy involves a wide range of engineering technologies that permit for obtaining energy from the ocean using a variety of conversion mechanisms. It appears that most of the offshore renewable energy installations, at least in the near future, will be constructed in the internal waters, territorial sea and exclusive economic zone (EEZ) of coastal states, and, in the case of archipelagic states in archipelagic waters.

Despite some uncertainties, the Convention provides guidance with regard to marine governance of renewable ocean energy resources in areas under national jurisdiction. In this regard the Convention recognizes that a balance must be struck in the EEZ and on the continental shelf between the rights and duties of the coastal State and the rights and duties of other states, and that the rights of the coastal state in the EEZ and over the continental shelf are to be exercised with due regard to the rights and duties of other states and in a manner compatible with the provisions of the Convention.

It may be assumed, however, that on some occasions, it will be difficult to find such a delicate balance of interests and therefore a dispute may arise between the states concerned. The Convention provides that, should all efforts to strike a due balance between the rights and duties of the coastal state

and those of other states be unsuccessful and should a dispute arise regarding the interpretation or application of the Convention, then such a dispute should be submitted to the compulsory procedures entailing binding decisions. These procedures are contained in Part XV of the Convention. In this regard, Article 297 stipulates that disputes concerning the interpretation or application of the Convention with regard to the exercise by a coastal state of its sovereign rights or jurisdiction are subject to the procedures provided for in Part XV of the Convention.

It may sound too optimistic to talk about a potential use of renewable ocean energy resources of the high seas. However, at least theoretically, wind and wave energy of the high seas could be a source of renewable energy. While at first glance the high seas may seem an endless expanse, suitable areas for renewable energy development shrink when factors such as shipping lanes, fishing interests and proximity to onshore demand and infrastructure are taken into account.

The Convention is much less clear on the governance of such resources on the high seas. According to Article 87, the high seas are open to all States and freedom of the high seas listed in the Convention comprise, *inter alia*, freedom to construct artificial islands and other installations permitted under international law, subject to Part VI on the continental shelf. The Convention emphasizes in Article 87, paragraph 2, that “these freedoms of the high seas must be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under the Convention with respect to activities in the Area.”⁴

Once the technology exists to do so, a state can construct renewable ocean energy installations in an area on the high seas and lay, if necessary, cables for the transmission of energy back to shore, in accordance with Article 87, paragraph 1(c) concerning freedom of laying submarine cables on the high seas. The state that will exercise exclusive jurisdiction over such installations, will also be responsible for providing warning of their presence, and removing them when disused.

Pursuant to Article 87, paragraph 2, freedoms of the high seas are to be exercised by states with due regard for the interests of other states in their exercise of the freedom of high seas. The construction of large installations of renewable ocean energy generators on the high seas will inevitably raise a

4. United Nations Convention on the Law of the Sea art. 87, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

question of marine governance. For this reason, the development of a special regulatory regime for high seas renewable energy installations would seem to be prudent. This regime should supplement the current regime established by the Convention and provide a fair balance between the freedom to construct renewable ocean energy installations and other freedoms of the high seas and it should be governed by the settlement of disputes mechanism established by Part XV of the Convention.

C. Transboundary Resource Management

Let me highlight another issue that has not yet been the object of international adjudication, but which seems to be of growing importance: the management of transboundary resources shared by adjacent or opposite States. With an increasing number of exploration and exploitation activities taking place on the ocean floor, it is only a matter of time before more oil and gas fields straddling maritime boundaries will be discovered.

In respect of how to treat transboundary resources, there is considerable state practice to be found in bilateral treaties. Practice is not uniform, of course, and I will not venture into an in-depth analysis of it here. What emerges from several such treaties is the idea of unitization, i.e., the joint development of transboundary deposits as a unit.⁵ More generally, treaties regularly stress the importance of cooperation between the States concerned, including information sharing. Another recurrent element of such agreements is the laying down of procedures for the parties to follow in case transboundary deposits are discovered.⁶

5. Treaty between the Kingdom of Norway and the Russian Federation concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean (2010), Annex II; Treaty between the Republic of Trinidad and Tobago and Grenada on Delimitation of Marine and Submarine Areas (2010), Article VII; Agreement between the Government of the State of Israel and the Government of the Republic of Cyprus on the delimitation of the exclusive economic zone (2010), Article 2; Unitisation Agreement for the exploitation and development of hydrocarbon reservoirs of the Loran-Manatee field that extends across the delimitation line between the Republic of Trinidad and Tobago and the Bolivarian Republic of Venezuela (2010).

6. Such clauses may, more generally, provide for the parties to engage in further negotiations (Treaty between the Republic of Trinidad and Tobago and Grenada on Delimitation of Marine and Submarine Areas (2010), Article VII) or may establish more detailed procedures to be followed (Treaty between the Kingdom of Norway and the Russian Federation concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean (2010), Annex II).

It remains to be seen to what extent international judicial bodies will be confronted with disputes involving the management of transboundary resources. When agreeing to submit a boundary dispute to international adjudication, states may find it necessary to request the court or tribunal to take into account the existence of transboundary resources.

It will be for the judicial body seized in a dispute to decide whether and to what extent its decision on the course of the boundary line needs to be informed by the location of such resource deposits so that an equitable solution can be achieved. I wish to emphasize that a decision of that kind can only be made on a case-by-case basis, taking into account all the particularities of each case. Parties may request an international court or tribunal to decide how they should arrange for the exploitation of shared resources straddling the boundary line. Inspiration may be taken from bilateral treaty practice to which I previously referred. If requested by the parties to the case, a judicial body may, again if the specifics of the case so warrant, give indications on how the parties should organize the necessary cooperation between them. This could include unitization, if appropriate.

D. The Deep Seabed

Let me now refer to an issue that undoubtedly counts among those receiving the most attention in the current international law of the sea, namely the exploration and exploitation of the resources of the deep seabed beyond the limits of national jurisdiction. These areas of the world's oceans may contain deposits of key strategic metals and minerals such as copper, cobalt, nickel and manganese. While the demand for these resources continues to grow, including meeting the needs of the green economy, land resources are increasingly stretched, causing the economic, social and environmental costs of mining to rise.

Current global supply of these metals and minerals is distributed unevenly around the world. For example: the Democratic Republic of the Congo controls 47% of global cobalt reserves and Chile 30% of global copper reserves; South Africa possesses 80% of global manganese reserves, while China controls 95% of the global market in rare earth elements. Deposits of these resources in the deep seabed by far exceed those on land. The economic situation will therefore change drastically once exploitation of them commences.

States and private-sector mining interests are keen to explore the potential of marine minerals both within and beyond national jurisdiction. Thanks to

technological advances and a stable regulatory regime, both in national jurisdictions and in the Area, deep seabed mining is an increasingly attractive option for investment in mineral development. Twenty-five private companies and public entities, including from Japan, China, India and Russia, have concluded contracts with the International Seabed Authority under the Convention's regime for the exploration of the deep seabed mineral resources. Depending on the development of market prices for the minerals concerned, exploitation of the deep seabed may actually start in the next two to three years.

As activity in the Area will increase in the future, the likelihood of new disputes also will grow. In particular, it is to be expected that, when the various activities enter the exploitation phase, the potential for conflict among the actors will increase and disputes may arise, for instance between the Authority and contractors. In this regard, mention may be also made of an emerging issue that is currently discussed at the International Seabed Authority: the carrying out of marine scientific research in exploration areas. Article 87, paragraph 1(f), concerning freedom of the high seas, stipulates that freedom of high seas includes, *inter alia*, freedom of marine scientific research, subject to Parts VI and XIII of the Convention. In accordance with paragraph 2 of that article, freedoms of the high seas must be exercised by all States with due regard, *inter alia*, for the rights under the Convention with respect to activities in the Area.

However, the Convention does not have any specific provisions that address a situation where the conduct of marine scientific research affects the exercise of the rights of an entity that has signed a contract with the Authority authorizing it to conduct exploration activities in a particular part of the Area. It follows from the discussions that took place at the last session of the International Seabed Authority that there appear to be situations where the conduct of marine scientific research may allegedly interfere with the full implementation by a contractor of its plan of work approved by the Authority.

Another issue is the interrelationship between the exercise of the freedom of the high seas, such as of the laying of submarine cables, and activities in the Area. Some of these cables may be laid on parts of the ocean floor that the International Seabed Authority has designated for exploration and subsequent exploitation activities. It should be noted in this regard that Article 139 of Part XI of the Convention provides that States Parties shall have the responsibility to ensure that activities in the Area, whether carried out by

States Parties or state enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, are carried out in conformity with Part XI of the Convention.

Finally, there is a potential source of conflict is the issue of transboundary resources straddling the line dividing national jurisdiction and the Area. Article 142, paragraph 2, of the Convention provides that “in cases where activities in the Area may result in the exploitation of resources lying within national jurisdiction, the prior consent of the coastal State concerned shall be required.”⁷ A dispute may arise between the Authority, or entities that are given contracts by it, and the coastal state concerned in the context of managing such transboundary resources. If such a dispute arises, the issues that need to be addressed are one, who are the parties to such a dispute, and two, which judicial body would have the authority under Part XV of the Convention to adjudicate this dispute.

III. CONCLUSION

I have endeavored to give you an overview of some of the emerging issues that may arise with regard to potential uses of maritime spaces and their resources. I am convinced that new challenges and problems will come to light. The International Tribunal for the Law of the Sea stands ready to offer its services to States and other actors seeking a peaceful resolution of sea-related disputes.

Thank you for your attention.

7. UNCLOS, art. 142.